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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 323

H. C. HAMMER, MORRIS NORIAN AND RICHARD NORIAN,

Petitioners,

vs.

CHARLES W. SANDERS, JOHN L. FYE AND O. R. THOUREEN, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS THE SANDERS-FYE DRILLING COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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CITATIONS TO OPINIONS BELOW.

A previous opinion in the lower Illinois Appellate Court is reported in 6 Ill. App. 2d 346.

STATUTES INVOLVED.

In addition to those portions of the Federal Securities Act of 1933 cited by Petitioners, these sections are deemed material to this proceeding:

1. Section 3(a)(11) of Title I of the Federal Securities Act of 1933, 15 U. S. C. 77 *c*(a) (11):

Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

* * * * *

(11) Any security which is part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

2. Section 12 of Title I of the Federal Securities Act of 1933, 15 U. S. C. 77 *l*:

Any person who—

(1) sells a security in violation of section 77 *c* of this title * * * shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for said security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damage if he no longer owns the security.

STATEMENT OF THE CASE.

There is no dispute but that Petitioners and Respondents entered into a series of agreements. In their statement of fact, Petitioners label these as sales of undivided interests in oil and gas leases. That was the factual question involved in the various appeals. Fairly phrased, the conflict of fact is whether or not the dollar amounts mentioned in each letter agreement was spent to acquire an undivided interest in an oil and gas lease or to purchase the services necessary to drill an oil well.

Only for purposes of these suits have Petitioners claimed that the instruments represent the sale of interests in oil and gas leases. In testimony (R. 2; 149, 141) and in income tax returns (R. 2; 157) Petitioners took the position that the amounts expended for which recovery was sought were for drilling costs and not for costs of acquisition of securities.

Further facts having an important bearing on this ap-

peal are the undenied facts that only seventeen persons, all of whom were residents of the State of Illinois, participated in the transactions of which complaint was made (R. 2: 178, 181).

Petitioners received and continue to receive payments on the very transactions which they have sought to rescind (R. 2: 150, 152, Petition, Appendix B, x, xi). The amount for which judgment entered was for the entire amount claimed to have been expended for the so-called "securities."

ARGUMENT.

I.

The opinion of the Illinois Supreme Court pointed out that the only question presented to it involved a violation of the Illinois Securities Act. As stated by that Court (Petition, App. B, vi, vii, 8 Ill. 2nd 414 at 418):

> "By their complaints, filed in February, 1953, the plaintiffs sought to rescind the transactions and recover all sums expended by them. They alleged a violation of both the Illinois Securities Act of 1919 and the Federal Securities Act of 1933. The defendants disputed their right to recover, *and as presented and argued in the briefs and on oral argument, the determinative issue is two-fold: (1) Were the instruments or interests involved securities which were sold in violation of the Illinois statute?* (Ill. Rev. Stat. 1953, chap. 121½, par. 97.) *(2) If so, did the plaintiffs make proper statutory tender?* (Ill. Rev. Stat. 1953, chap. 121½, par. 132.)" (Emphasis supplied.)

The opinion is of course decisive as to what issues were presented to and decided by that Court. The effect of the opinion is to declare that the Petitioners had abandoned or waived their position with reference to the Federal Securities Act.

Rule 39 (1)IV of the Illinois Supreme Court emphasizes that "A point made but not argued may be considered waived."

The claimed violation of Federal law having been waived or abandoned under the State practice, this Court will not refuse recognition of the effect of that practice.

Justice McKenna in *Hulbert* v. *City of Chicago*, 202 U. S. 275, 26 S. Ct. 617, 618, announced the Court's adherence

to Illinois' Rules of Practice in a case originating in Illinois:

> "According to the practice of the court, an error not assigned is not open to review. *Berry* v. *Chicago*, 192 Ill. 154, 155, 61 N. E. 408. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keyes* v. *Kimmel*, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153, 46 L. ed. 487, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error."

To the same effect is *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 S. Ct. 330.

II.

It may be less than satisfying to show the existence of the waiver or abandonment without showing the reasons therefor. In order to show this Court that no injustice is being done Petitioners on this score it is only necessary to refer to those facts which would prohibit any judgment under the Federal Securities Act from being entered. These facts are uncontroverted in the record.

Petitioners, Respondents, and all members of the group which participated in the transactions of which complaint was made were residents of the State of Illinois (R. 2: 178, 181). The number of persons involved totalled seventeen (R. 2: 178, 181). Under the Federal Securities Act, Section 3 (15 U. S. C. 77 c) provides the following pertinent exemptions even if the transactions were classified as "security" transactions:

> "(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:
>
> * * * * *

> (11) Any security which is part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within such State or Territory."

These Petitioners are asking this Court to review a Federal question which on the uncontroverted facts could not but result in a judgment for the Respondents. The explicit exemption granted "intrastate" transactions bars any recovery under the quoted section.

Presumably to negate the damaging impact of these facts, Petitioners have inserted in their Petition (pp. 10, 11) a suggestion that only affidavits are controlling on motions for summary judgment. By use of this technical exclusion, Petitioners seek to obscure and eliminate from this Court's consideration the undenied truth of Respondents' sworn allegation that all members of the group were residents of the State of Illinois.

The method is of even more dubious propriety when Petitioners recite, as Illinois law, that affidavits alone are controlling on motions for summary judgment. This proposition is not sustained by the cases cited in support thereof. The law in Illinois is that the "whole record must be considered" on summary judgment. *Sampson Co.* v. *Mandel Bros. Inc.*, 3 Ill. App. 2d 92, 95; *Gliwa* v. *Washington Polish Loan & Building Association*, 310 Ill. App. 465, 471. Only "if it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous" will it be disregarded. *Gliwa* v. *Washington Polish Loan & Building Association, supra*, p. 470. These, the controlling tests under Illinois law, dictate the conclusion that the facts constituting an absolute bar to any recovery under Federal law must be recognized. Once so recognized, no

ground exists to predicate a violation of a Federal right and certiorari must be denied.

III.

The petition for certiorari should be denied for still another reason. Petitioners have failed to specify, as required by this Court's rule 23 1.(f), the manner in which the federal question sought to be reviewed was raised in the Illinois Appellate and Supreme Courts; the method of raising that question in those Courts; and the way in which the question was passed upon by them.

These omissions are of the utmost significance in view of the previously described waiver or abandonment and in view of the limited scope of the opinion of the Illinois Supreme Court.

This same limited scope was dictated by the Petitioners' own theory of the case. Among the claims of Respondents was that the judgment was in error because Petitioners had judgment for the entire amount of their expenditures and still retained the income from the producing wells (R. 2: 150, 152, Petition, Appendix B, x, xi; 8 Ill. 2d 418). The Federal Securities Act (Section 12 of Title I, 15 U. S. C. 77 *l*) authorizes recovery only of the amount paid *less* income received on the "securities." Thus, the judgment for the full amount was congruous only with Petitioners' position with reference to the Illinois law and not with Federal law.

There is further internal evidence that the judgment of the trial court was predicated solely on Count I, the count under the Illinois Securities Act. The sixth paragraph of the judgment order (R. 2: 186) provides:

> "That consideration of the matter of plaintiff's reasonable attorneys' fees herein pursuant to statute in such cases made and provided is hereby reserved."

Only the Illinois Securities Act permits recovery of attorneys' fees (Ill. Rev. Stat. 1953, chap. 121½, par. 132 (l)). The Federal Statute, Section 12 of Title I of the Federal Securities Act of 1933; 15 U. S. C. 77 *l*, contains no warrant for attorney's fees.

Having accepted the larger benefits available under Illinois law, Petitioners may not now contend that the reversed judgment was rendered in conformity with Federal law. A corollary to this proposition is that Petitioners may not urge that the reversal of the judgment founded on Illinois law infringes any Federal right.

CONCLUSION.

Only by abandoning the shores of fact for the seas of fiction is even a semblance of worthiness attained by Petitioners' arguments. Pumping the water out of Petitioners' specious arguments, we have only a decision on a point of Illinois law which the Illinois Supreme Court is well equipped to decide. The Illinois Court's opinion has effect only in deciding the internal law of this State. Respondents are without knowledge as to the dire effects predicted so freely by Petitioners but suggest that the Illinois legislature is the place to voice those fears. No Federal law, no intent of Congress has been transgressed where the grounds for decision were state grounds and were so specifically limited by the deciding Court. Yet, in reading the Petition for Certiorari, the feeling is forced that Petitioners have sought to mislead this Court as to what was actually decided and have failed to bring to this Court's attention those facts which would preclude its review.

Because the opinion of the Illinois Supreme Court was

concerned solely with interpretation of Illinois law and because an absolute exemption to the operation of Federal law exists, the petition should be denied.

We respectfully urge that the petition for a writ of certiorari should be denied.

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